

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GERHARD GRAAB,
KLAUS HECKEL,
DIETER RISCHER,
THORSTEN NAHE,
and
HELMUT GRUNHAG

Appeal No. 1998-1002
Application No. 08/390,175

ON BRIEF

Before KIMLIN, JOHN D. SMITH, and LIEBERMAN, **Administrative Patent Judges**.

LIEBERMAN, **Administrative Patent Judge**.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the decision of the examiner refusing to allow claims 1 through 14 as amended subsequent to the final rejection, which are all the

claims in the application.

THE INVENTION

The invention is directed to a rubber-based floor covering of 1 to 4 mm in thickness and having crosslinkable elastomeric material embedded in the top side of the base sheeting. The crosslinkable elastomeric material comprises at least two different granular particle regions having different colors from each other and from the base sheeting. The aggregate mixture of the sheeting and the embedded particles have an overall color approximately equal to that of the sheeting material.

THE CLAIMS

Claims 1 is illustrative of appellants' invention and is reproduced below.

1. A multicolored, patterned floor covering comprising:

sheeting formed of a cross-linkable elastomeric material having a first color, said sheeting being 1mm to 4mm in thickness; and

embedded particles formed of a cross-linkable elastomeric material that are contained within the sheeting, said particles each having at least a first and second subregions, each of which subregion

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has a color that contrasts both with the first color
of the sheeting material and the other subregion;

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wherein the colors of the sheeting material
and the colors and quantity of the embedded
particles employed in the in the [**sic**] sheeting are
such that an aggregate mixture of the sheeting and
embedded particles has an over-all color that
approximately equals the first color of the sheeting
material.

THE REFERENCES OF RECORD

As evidence of obviousness, the examiner relies upon the
following references.

Charlton et al. (Charlton)	3,040,210	Jun. 19,
1962		
Sachs	4,239,797	Dec. 16,
1980 Gembinski et al. (Gembinski)	4,784,911	Nov.
15, 1988 Heckel et al. (Heckel)	5,154,868	
Oct. 13, 1992		

THE REJECTIONS

Claims 1 through 14 stand rejected under 35 U.S.C. §
103(a) as being unpatentable over Sachs in view of Charlton,
Gembinski and further in view of Heckel.

OPINION

We have carefully considered all of the arguments
advanced by appellants and the examiner and agree with the
appellants that the aforementioned rejection under 35 U.S.C. §
103 is not well founded. Accordingly, we do not sustain this
rejection.

The Rejections under 35 U.S.C. § 103(a)

"[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a prima facie case of unpatentability," whether on the grounds of anticipation or obviousness. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). On the record before us, the examiner relies upon a combination of four references to reject the claimed subject matter and establish a prima facie case of obviousness. The basic premise of the rejection is that it would have been obvious to one of ordinary skill in the art, "to use rubber particles and a rubber matrix in the flooring of Sachs in view of Charlton et al. further in view of Gembinski et al in order to produce a decorative elastomeric flooring because of the teachings of Heckel et al. '868." See Answer, page 6. We disagree.

Although Sachs discloses a non-skid floor tile having thermoplastic material embedded in the vinyl tile, column 1, lines 31-35, we find no suggestion for the utilization of either rubbery material or of the thickness of the material as required by the claimed subject matter.

Furthermore, the disclosure of Gembinski is not even

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related to floor coverings. The basic invention of Gembinski is directed to multicolored plastic parts. We find no suggestion of either rubbery material or of the thickness of the material as required by the claimed subject matter.

Indeed, the only reference relied upon by the examiner directed to cross-linkable elastomeric patterned floor coverings is Heckel.

Heckel is directed to patterned floor coverings from a preform of rubber wherein the rubber is mixed with contrastingly colored zones. See Abstract. The zones in the floor covering are formed by mixing a rubber mixture of one color with contrastingly colored particles of another color. See column 1, lines 55-61. We find that Heckel states that "[t]he rubber mixture and the particles used in the mixing step of the invention are dyed differently to have contrasting colors. The rubber material forming the particles is in, at least, an advanced state of vulcanization compared to the rubber mixture. The particles thereby are inhibited during vulcanization of the blank from softening with the rubber mixture, which precludes mutual mixing of the dyes contained in the particles and in the rubber." See column 2, lines 32-40. Based upon the above statement, it is evident that the particle sections differ in color from that of the base sheeting. Furthermore, when different color particles are utilized, the color of each necessarily remains different from

the others as no mixing of the dyes in the particles occurs. This disclosure, however, is in direct contrast to the requirements of the claimed subject matter that, "an aggregate mixture of the sheeting and embedded particles has an over-all color that approximately equals the first color of the sheeting material."

Moreover, on the record before us, there is no rationale presented why the person having ordinary skill in the art would substitute the elastomeric floor coverings of Heckel for the thermoplastic floor covering of Sachs, or why would one choose the requisite dyes in Heckel in such a manner so as to result in overall color approximately the same as the sheeting material as required by the claimed subject matter. Accordingly, even if the substitution was made, we still would not obtain the invention of the claimed subject matter, as contrasting colors would be obtained contrary to the requirements of the claimed subject matter.

Based upon the above considerations, even if the examiner was correct in combining Sachs, Gembinski, Charlton and Heckel in the manner supra, the structure created would, in any event, fall short of the invention defined by the claimed

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subject matter, as the aforesaid claimed subject matter requires features that cannot be achieved by combining the four references. Uniroyal Inc. v Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert denied, 488 U.S. 825 (1988). Accordingly, the examiner has not established a prima facie case of obviousness.

The rejection of the examiner is not sustained.

REVERSED

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EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN D. SMITH)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
PAUL LIEBERMAN)	
Administrative Patent Judge)	

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Kenyon and Kenyon
One Broadway
New York, NY 10004